

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 Before The Honorable Thomas S. Hixson, Magistrate Judge
4
5 EPIC GAMES, INC.,)
6 Plaintiff,)
7 vs.) Case No. C 20-05640-YGR
8 APPLE, INC.,)
9 Defendant.)

11 San Francisco, California
Tuesday, December 3, 2024

13 TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND
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14 APPEARANCES:

15 For Plaintiff:

Cravath, Swaine & Moore, LLP
375 Ninth Avenue
New York, New York 10001
YONATAN EVEN, ESQ.

18 For Defendant:

Gibson, Dunn & Crutcher, LLP
333 S. Grand Avenue
Los Angeles, California 90071
JASON C. LO, ESO.

21 Weil, Gotshal & Manges, LLP
22 2001 M Street, NW
23 Suite 600
BY: Washington, D.C. 20036
MARK A. PERRY, ESQ.

1 Transcribed by:

Echo Reporting, Inc.
Contracted Court Reporter/
Transcriber
echoreporting@yahoo.com

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1 Tuesday, December 3, 2024

1:01 p.m.

2 P-R-O-C-E-E-D-I-N-G-S

3 --oOo--

4 THE CLERK: All right, everyone. Good afternoon.

5 We are here in Civil Action 20-5650, Epic Games versus
6 Apple, Inc., the Honorable Thomas S. Hixson presiding.

7 Counsel, please state your appearances. Let's start
8 with Plaintiff's counsel.

9 MR. EVEN (via Zoom): Yonatan Even for Epic Games.
10 Good afternoon, your Honor.

11 THE COURT: Good afternoon.

12 MR. PERRY (via Zoom): Mark Perry for Apple, your
13 Honor. Good afternoon.

14 THE COURT: Good afternoon.

15 MR. LO (via Zoom): Good afternoon. Jason Lo,
16 also for Apple.

17 THE COURT: Good afternoon.

18 We're here today to discuss Apple's claims of attorney-
19 client privilege. Epic has reported in one of the status
20 reports that Apple has produced approximately 95,000
21 documents but withheld approximately 57,000 documents. So,
22 there have been a large number of withholdings, and Epic has
23 argued that Apple has improperly withheld many of these
24 documents.

25 Yesterday I issued an order addressing 11 examples of

1 disputed claims of privilege, and I had largely rejected
2 Apple's claims of privilege and work product, and there's 11
3 examples. But today I wanted to discuss with the parties
4 how we deal with the 57,000 documents. I do not personal --
5 oh, and before we continue further, I should let counsel
6 know that there is some construction going on outside of the
7 Federal Courthouse -- outside of the Federal Building that
8 is. So, if you hear loud noises during the hearing, that's
9 what that is.

10 In any event, turning back to the subject at hand, I do
11 not personally have the bandwidth to review 57,000 documents
12 to determine if the privilege claims are appropriate or not.
13 I know that the parties have been meeting and conferring
14 about these issues. So, I wanted to get your thoughts about
15 what the best way to proceed is. I would be happy to
16 continue ruling on samples or examples that the parties
17 think might raise issues that come up on many occasions if
18 -- if that would be useful for the parties. Maybe we should
19 also talk about whether a special master might be
20 appropriate in this situation. I can't appoint a special
21 master. That would have to be done by Judge Gonzalez
22 Rogers, but I could make a recommendation about whether a
23 special master would be appropriate.

24 I'm also guessing that since the parties have both been
25 thinking about these issues and meeting and conferring, you

1 have -- might have some additional ideas about what might be
2 good ways to approach the 57,000 documents.

3 So, first, let me turn to Epic Games, and please give
4 me your thoughts.

5 MR. EVEN: Thank you, your Honor.

6 I'd like -- I'll try to be quick. I guess I have four
7 quick points on this. The first is that, as we understand
8 yesterday's rulings, we challenged four documents that were
9 completely withheld, and your Honor overruled those claims
10 completely. We challenged very specific redactions on six
11 other documents that were redacted. I believe, unless I'm
12 missing something, that your Honor overruled all the
13 redactions that we actually challenged, and then your Honor
14 looked at other redactions and found that many of those
15 redactions that we didn't even challenge because we didn't
16 have enough information for a good faith challenge were also
17 overbroad.

18 And, so, where we are now is that we have these
19 findings by your Honor. We have challenges that we made
20 that we thought were blatant inappropriate privilege calls.
21 We think that your Honor appropriately stated -- correctly
22 stated yesterday that the legal advice requested by counsel
23 and the advice provided are privileged, but that's it and
24 that Apple's approach in this case has not been a stretch or
25 even aggressive. It's just been a complete departure from

1 that principle.

2 We have Document 646 which we briefed to your Honor
3 about this as a good example. We challenged the specific
4 statement from Mr. Schiller that's at the top of page 653.
5 Apple objected and said that this statement explicitly
6 refers to legal advice. We said that was blatantly false
7 because another document actually revealed that language.
8 Apple did not relent. It doubled down. It clawed back
9 Document 488.

10 We explained in our papers again that this is improper.
11 Apple actually gave your Honor Document 488 as it was clawed
12 back. So, that was not even a document we challenged. That
13 was a document we provided as an example to the Court of
14 language that we've -- that showed language in unredacted
15 format that Apple elsewhere redacted and was improper.

16 Your Honor looked at that and found that, in fact, the
17 document was itself overly redacted, even the document we
18 didn't challenge. But that document is not, in fact, the
19 document we have now. Apple has since clawed back and
20 reproduced that document adding 21 new redactions to that
21 document. And your Honor I think should have that. At
22 least Apple told us that it gave your Honor something with
23 the highlighting showing the additional 21 redactions.

24 And, so, we -- we have a real issue of dealing with it
25 because it's not like we have a partner on the other side

1 where we can meet and confer and if we show something or
2 they review something, then in good faith we get the
3 document back, nor can we really meet and confer on 57,000
4 documents, which brings me to the third point, which is with
5 the 57,000 documents, we now have data that we provided to
6 your Honor in the last -- the last report, status report
7 that shows that specific core search strings produced
8 documents that your Honor has now found to not be
9 privileged, yet Apple withheld upwards of 50 percent of
10 those. For instance, Apple withheld as privileged 55
11 percent of responsive documents hitting the scare screen
12 search term. Apple withheld 51 percent of the analysis
13 group search screen. Apple held -- withheld 75 percent of
14 responsive documents hitting on a search string concerning
15 the 27 percent commission.

16 All this brings me to the remedy I guess, which is your
17 Honor's question. We think that as things stand right now,
18 this is a win win for Apple if we challenge them. They've
19 offered before that we should raise it on a document-by-
20 document basis. That's untenable, and it takes forever. We
21 can't brief and rebrief 11 documents at a time. And, so, if
22 we do that, they win. And if we don't challenge it, we
23 don't get the documents, and they win. And we think that
24 given the weakness of the privilege claims as reflected in
25 your Honor's order from last night, we think this is a clear

1 litigation tactic. This is not a mistake or a one off
2 error. This is Apple having, frankly, bogus privilege
3 claims and then standing -- standing its ground and refusing
4 to back down, even when we call them on it, and they do it
5 for thousands and thousands of documents, and we are now six
6 months since the Court's ordered for them to produce all
7 documents, and we just don't have the documents.

8 So, we, frankly, think that at this point, given that
9 this is I don't think strike one or two or three by Apple on
10 -- on trying to withhold the documents in this case. We --
11 we got to your Honor because Judge Gonzalez Rogers, frankly,
12 gave up on -- because of the timing that it took and because
13 Apple was playing games around producing documents from a
14 single custodian. We had the issue with the incessant
15 delay. It took us forever to get the yield numbers. It
16 took us a long back and forth to get last night's decision.
17 We think there's an issue here of abuse, and we think that
18 the right remedy for abuse is to somehow break the win win
19 situation for Apple. And, frankly, if you abuse it, you
20 lose it, and we think that's probably the most correct
21 outcome here is for Apple to just provide Epic with these
22 documents and lose the protection it's entitled to.

23 Short of that, if your Honor is not inclined to do
24 that, we think it's perfectly clear that a re-review is
25 warranted, but it can't be by Apple because Apple has made

1 it abundantly clear that a re-review by them just can't be
2 trusted. That means probably a special master. It can be
3 special masters in plural that Apple finances and pays for
4 and they do a quick job and review all of this or it can do
5 a -- be a process where Apple re-reviews but it knows that
6 the document either comes to Epic or it goes to a special
7 master or special masters if the -- if they decide to stand
8 on a privilege claim. But we are now in front of a
9 situation that's really untenable in terms of just meeting
10 and conferring and continuing the situation because it's not
11 that we're not going to get the documents we need ahead of
12 the January 13 2025 proposed hearing date. It's that if
13 it's up to Apple, we're not going to get them for a January
14 13, 2026 hearing.

15 THE COURT: All right. Thank you.

16 Let me turn to Apple. Please give me your thoughts.

17 MR. PERRY: Thank you, your Honor. I agree that
18 what has happened is untenable but for very different
19 reasons. And let me start with the point that Epic has not
20 moved to compel a single document in this case, right?

21 The dispute actually before the Court is Epic's request
22 for a ruling that four categories of documents are
23 categorically not privileged. The Court has not ruled on
24 that motion. Epic provided 11 exemplar documents. It's not
25 a motion to compel, and, therefore, we did not provide and

1 did not have the opportunity to provide declarations and the
2 normal source of evidence that the Court would need to
3 decide this privilege dispute. And with all respect, Judge
4 Hixson, the ruling lacks context and makes a number of
5 significant errors.

6 If I could make just a couple of examples. Document
7 2094, which is the final Price Committee deck, the Court
8 ruled that the document is not privileged. The document is
9 not privileged. We agree. Epic has that document. It, in
10 fact, was introduced as evidence in the trial. The
11 privilege claim here is that the version of the document
12 that was withheld was collected by litigation counsel and
13 provided to Mr. Schiller, a witness, to prepare him for
14 trial, and it was in a file collected with other litigation
15 preparation materials, and the claim of privilege clearly
16 attaches to that. That is the claim of privilege. It was
17 not ruled on by the Court, and it is not bogus. It is
18 absolutely ironclad.

19 Second, your Honor, the draft Press Deck, Document
20 1068518, the Court said in its ruling that a case summary
21 prepared by a lawyer and delivered to his client would be
22 privileged. That is exactly what we redacted. Jen Brown,
23 Jennifer Brown is a lawyer for apple. She prepared a case
24 summary and delivered it to her client, Apple, in that
25 draft --

1 THE COURT: It wasn't for the client. It was a
2 draft press release -- or draft press briefing that was
3 external. This was not a lawyer advising the client.

4 MR. PERRY: Your Honor, I would respectfully
5 disagree for two reasons. First, the fact that it is
6 ultimately delivered to the public doesn't mean that the
7 draft is not privileged. My argument notes that are
8 delivered to the client are attorney-client privileged even
9 if I say the same words out loud in open court on a
10 transcript. That's just black letter privilege law.

11 Second, it was delivered to the client -- and we would
12 establish this by a declaration if we went in the normal
13 course on a motion to compel -- it was delivered to the
14 client for review and comment as with all of these things
15 and had feedback on it. And that is not final. The final
16 version of the press report, again, Epic has it. They only
17 want the previous versions to see what changes, which is,
18 again, reverse engineering the advice or the change in
19 advice that was given.

20 The Court also said in its ruling on that document that
21 it had to be received by a lawyer, but it goes both ways.
22 It was received by a client. It was delivered by a lawyer
23 to a client as part of an ongoing provision of advice.

24 One more point. My friend, Mr. Even, mentioned what he
25 calls the scare screens, what we call the system disclosure

1 sheets. The Court said in the ruling that those -- that
2 common sense said they were driven by engineering and
3 marketing. Well, the facts are the text was written by
4 Legal. It was edited by Legal. It was revised by Legal,
5 and it was extensively commented on by Legal. It was not
6 driven by engineering and marketing. And the reason for
7 that, as we put in our papers, is that a similar issue was
8 being litigated by Epic in the Google litigation in front of
9 Judge Donato. And the lawyers were monitoring that
10 litigation and advising on the language to be used in the
11 system disclosure sheet, and that is why the redactions were
12 properly made, because all of those versions can and will by
13 Epic, if these documents are produced, be used to reverse
14 engineer the advice that was received.

15 And, more generally, your Honor, again, the ruling
16 seems to reflect a bit of a -- a four corners approach to
17 privilege which is taking these documents out of the context
18 from which they are prepared. This entire exercise was the
19 response to a court order. Judge Gonzalez Rogers ordered
20 Apple to do something, and the litigators, including myself,
21 including Mr. Lo, including a host of in-house counsel,
22 extensively advised the business on what could and couldn't
23 be done in compliance with the injunction, and it is not
24 surprising, as we've said, that so many documents are
25 privileged. What is surprising, frankly, is that, for

1 example, the analysis group drafts where the documents
2 clearly show that analysis group was retained by the company
3 at -- with the advice of counsel to prepare a -- an analysis
4 for purposes of this injunction, that the drafts that went
5 to Legal, such as the document that was in the set, are, in
6 fact, privileged. It says on the cover, "Prepared at the
7 request of counsel," as it was, and it was reviewed and
8 commented on by counsel. Again, the final version, Epic has
9 it. Everybody has it. That's fine. It is not, however,
10 the case, that a -- that a litigation-related drafting
11 project like with an expert, like with a consultant, is --
12 is not privileged. And, again, I think the context seems to
13 have dropped out of this discussion.

14 THE COURT: Well, I disagree with everything
15 you're saying. And the fact that you are making these
16 meritless arguments causes me a lot of concern.

17 MR. PERRY: Your Honor, with respect, they're not
18 meritless. They are well rounded in privilege log and the
19 facts of this case and the way this case developed, you
20 know, the way the analysis group was retained, for example.
21 That is all matters that were in the trial record that is
22 clear from -- from the information. I understand we can
23 have a disagreement, but, you know, we'd like to have our
24 side of the story heard. You know, again, we've not had a
25 motion to compel. We have not put any declarations in. We

1 have not put any evidence in on this.

2 You asked about a -- a process. Challenging documents
3 on a log has a process. It's called a motion to compel.
4 Epic hasn't brought one. It could. It has had these logs
5 for months. It could bring a motion to compel on any or
6 every document, and we would respond to it in the usual way
7 with declarations and evidence and -- and information to
8 contextualize the statements, the documents, the redactions,
9 and so forth.

10 THE COURT: Your argument that you didn't have an
11 opportunity to brief this is wrong. The parties filed a
12 joint discovery letter brief, which is the proper process
13 for raising discovery disputes. It's not through formal
14 motion briefing. You filed a joint discovery letter brief
15 arguing about certain categories of documents and then
16 discussing 11 specific documents over which the parties have
17 a dispute as to claims of privilege. I ordered Apple to
18 file the documents as produced on the record, and then I
19 ordered Apple to provide for in-camera review the unredacted
20 documents, and I reviewed them and I reviewed Apple's
21 privilege log, and the privilege log is supposed to
22 substantiate the claim of privilege, and then I made my
23 privilege rulings. You weren't deprived of an opportunity
24 to brief this. You briefed it in the normal way that
25 discovery disputes are -- are briefed, and you simply came

1 up empty on the merits.

2 MR. PERRY: Your Honor --

3 THE COURT: I'd like to talk about the going
4 forward issue because we have the 57,000 documents, and we
5 need to have a process for how to address those. So, if you
6 could please turn to that issue.

7 MR. PERRY: Happily, your Honor. I do think it is
8 a -- a project the parties need to undertake with each other
9 in good faith, and I'm -- I'm a little surprised to hear --
10 I think we do work together well.

11 The Court mentioned a special master. I think -- I'm
12 not sure there's any other way to do it, frankly, than to
13 have a special master. We had a special master, as I
14 recall, in the merits litigation for certain similar issues,
15 and I believe that process worked quite well. And, you
16 know, I -- if that is the path forward, that -- that is one.

17 The -- the other, which is for Epic to decide what it
18 actually wants. It has the logs. It has studied the logs.
19 There are many repetitions in these documents. They have
20 many -- and they have hundreds -- almost 100,000 documents.
21 You know, I don't think they want 57,000 documents. I don't
22 think they need 57,000 documents.

23 What is it that they think they don't have that they
24 think is an improper claim of privilege? I don't know what
25 that number is. They haven't told us. If that number is

1 manageable, if it is 50 or 100 or 1,000 even, we could all
2 deal with it and be done, and that's on them I think to say
3 what it is they think they -- they need or want that they
4 don't think is sustained by the privilege calls already
5 made.

6 THE COURT: Well, let me turn to Epic. Do you
7 even know the answer to that question?

8 MR. EVEN: No, your Honor. I don't know what I
9 don't know. The problem is that part of our -- our briefing
10 was about the privilege logs where I have like, for
11 instance, 22,000 documents saying privileged because it's
12 regarding legal advice about injunction. This was the only
13 essentially request for production here. It wasn't a
14 request. It was an order for production, produce all the
15 documents about the injunction. That doesn't give me
16 anything. And as I -- as I explained in my opening remarks,
17 we now know that when your Honor looked at many privilege
18 claims that we didn't even challenge because we didn't have
19 the information, your Honor still found that those are
20 unsubstantiated.

21 And, so, I don't know what is the expectation of us at
22 this point to do more on that. We provided the -- the
23 categories that were so blatantly obvious that it was clear
24 to us that there's no -- that the privilege claims don't in
25 our view pass the laughing test. And then we said, and

1 everything else, of which there are tens of thousands, we
2 just don't know what's in there. In addition to that, we
3 now have these numbers that show us that very coerced search
4 strings hit on thousands of documents of which 50, 60, 80
5 percent were withheld for privilege. We don't know which
6 these are obviously, and there's no way for us to know that.

7 So, we have a real break in -- in trust here between
8 the parties. I don't think this is working well for us on
9 this front, and -- and everything I've heard from Mr. Perry
10 right now doesn't cause me -- you know, doesn't give me
11 additional confidence that going forward this is going to
12 somehow work.

13 THE COURT: Let's talk about process. In terms of
14 hiring one or more special masters, would the two sides like
15 me to give you some time to meet and confer about how you'd
16 like to do that or potentially identify one or more special
17 masters and then see if you can come up with a plan? I
18 would only have a few days because I would want the parties
19 to figure this out, and then we could come back for a
20 further hearing. I've raised with the parties the special
21 master idea, but I imagine you would each want to talk with
22 your co-counsel and your client about how exactly that would
23 work.

24 Let me first turn to Epic. Do you think I should tell
25 the parties to meet and confer about one or more special

1 masters and then we could set a further hearing date after
2 you've had the opportunity to talk with your client and co-
3 counsel and we can come back?

4 MR. EVEN: I think we can do that, your Honor.
5 But I think this needs to come to a head sooner rather than
6 later. So, we can have very limited time to -- for me to
7 confer with my client and then confer with Apple and quickly
8 come back to your Honor and -- and either come to a
9 stipulation or come to a ruling, but I do think that what we
10 need here is more than a single special master or else Apple
11 will again do its calculation and say, Well, we can load up
12 57,000 documents on a single special master because we're --
13 we are standing on all our privilege claims, and if there's
14 no sanction at the end -- at the end of that tunnel, then I
15 don't know what are we to do with that other than tell the
16 special master, Well, take your time and do it.

17 THE COURT: Mr. Perry, let me turn to you.
18 Process wise, do you think it's appropriate to have each
19 side have a -- a couple of days to confer with co-counsel
20 and their client about special masters in terms of how you'd
21 like to proceed?

22 MR. PERRY: I do, your Honor. And I agree with
23 Mr. Even. I think we can proceed quickly after we consult
24 with our clients, consult with each other. I think we can
25 come to a path forward I suspect talking about it. I --

1 yes.

2 THE COURT: Okay. Go ahead.

3 MR. EVEN: May I point out one more thing, your
4 Honor? I do think that whatever comes out from the special
5 master process, we will need some very clear guidance from
6 your Honor in light of the findings of last night's order,
7 meaning Apple cannot continue to stand on claims such as the
8 ones it stood on in those papers, which I am concerned about
9 given Mr. Perry's position as stated right now.

10 THE COURT: Well, the goal of the order was that I
11 was ruling on 11 examples. And, so, then other documents
12 that are similar to the ones that I've ruled on I would
13 expect Apple to apply that ruling to those other documents
14 that are similar or, alternatively, Apple could appeal me to
15 Judge Gonzalez Rogers, but it should be one of those two.
16 Either Apple appeals my discovery order or if Apple decides
17 to live with it, then it should follow it and apply the
18 order to other documents.

19 Let me turn to Apple. Is it your understanding that
20 you should do one of those two?

21 MR. PERRY: We agree, your Honor, and -- and, to
22 be transparent, we have not decided which -- which path --
23 which of those paths to go down. We wanted to have this
24 discussion first, but those are the two paths that we see
25 with regard to the 11 documents in the order.

1 THE COURT: Okay. Good. Then, also, one issue
2 that sometimes comes up with special masters is who should
3 pay for them. The parties can agree to whatever you want.
4 I'll just give you the benefit of my thinking. I think that
5 the parties should split the cost of one or more special
6 masters. Both sides have large resources, and if one side
7 bears all of the costs and the other side bears none of the
8 costs, that gives me a structural concern about incentives
9 that might be created, and I think it's best to avoid those
10 kind of incentives. And, so, I think having the two sides
11 split the costs best incentivizes the parties to behave in
12 an appropriate manner.

13 Now, let's get out our calendars and figure out when we
14 should come back for the next hearing. Today is Tuesday,
15 December 3rd. I could have a hearing on Thursday, December
16 5th if that would work for the parties.

17 Does that work for Epic?

18 MR. EVEN: It does, your Honor.

19 THE COURT: And does that work for apple?

20 MR. PERRY: It does, your Honor, with one conflict
21 in the middle of the afternoon Eastern Time, but this time,
22 for example, would work perfectly on Thursday, December 5th,
23 at 1:00 o'clock Pacific.

24 THE COURT: That would work for me as well. Does
25 that work for Epic?

1 MR. EVEN: It does, your Honor.

2 THE COURT: Okay. Then we'll set a further
3 discovery hearing for December 5th at 1:00 p.m. And between
4 now and then, I order the parties to meet and confer about
5 one or more special masters to deal with the 57,000
6 documents, and then on December 5th, the two sides can
7 update me with where you stand.

8 MR. EVEN: Thank you.

9 THE COURT: And the special masters don't have to
10 be a complete substitute for asking me to rule on additional
11 examples. If there are additional examples of documents
12 that Epic would like me to rule on, I'm happy to do that as
13 well. It's just I would be ruling on examples, and the idea
14 behind the special master or special masters is to find a
15 path toward the 57,000 documents.

16 MR. EVEN: Thank you.

17 THE COURT: Is there anything else that Epic would
18 like to discuss at this hearing today?

19 MR. EVEN: Yes, one more small point, your Honor,
20 if I may. We have asked Apple last night for the documents
21 that your Honor has already ruled on. They told us this
22 morning they are still conferring with their client. I was
23 hoping to get those ahead of this hearing so I can be -- you
24 know, cross through the veil of ignorance as it were as to
25 what's under these redactions. I don't think we're going to

1 discuss these documents again on Thursday, but on the off
2 chance that we would, I would ask your Honor to order Apple
3 to produce those promptly.

4 THE COURT: Well, Apple has the right to appeal my
5 discovery order to Judge Gonzalez Rogers. And, so, Apple --
6 I think that they can wait until that time. Apple should
7 make a decision about whether it's going to appeal.

8 Apple, if you decide that you're not going to appeal,
9 then I would expect you to provide those documents to Epic
10 right away, but it's up to you to make your decision.

11 MR. PERRY: Understood, your Honor, and agreed.

12 THE COURT: Is there anything else that -- oh, go
13 ahead.

14 MR. EVEN: No. I was just saying thank you, your
15 Honor.

16 THE COURT: Okay. Is there anything else that
17 Apple would like to raise at this hearing today?

18 MR. PERRY: Not today, your Honor. Thank you for
19 the time and the attention.

20 THE COURT: Okay. Thank you, Counsel. We will
21 come back on December 5th at 1:00 p.m. Pacific Time for a
22 further hearing. We're adjourned for the day.

23 (Proceedings adjourned at 1:31 p.m.)

24

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1 CERTIFICATE OF TRANSCRIBER
23 I certify that the foregoing is a true and correct
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6 the U.S. District Court, Northern District of California, of
7 the proceedings taken on the date and time previously stated
8 in the above matter.9 I further certify that I am neither counsel for,
10 related to, nor employed by any of the parties to the action
11 in which this hearing was taken; and, further, that I am not
12 financially nor otherwise interested in the outcome of the
13 action.14 
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1718 Friday, December 6, 2024
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